SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

NO. [redacted] 167

EXTON DRIVE-IN, INC.,

Petitioner,

vs.

THE HOME INDEMNITY CO. and
W. ARNOLD BLYTHE, Individually
and t/a BLYTHE CONTRACTORS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT

PETITION FOR WRIT OF CERTIORARI

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IN THE

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THE HOME INDEMNITY CO. and
W. ARNOLD BLYTHE, IND. & t/a
BLYTHE CONTRACTORS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT

The petitioner, Exton Drive-In Inc., prays that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania, Eastern District, entered in the above-entitled case on November 28, 1969.

Opinions Below.

The majority opinion of the Supreme Court of Pennsylvania, printed in Appendix B hereto, is reported at 436 Pa. 480 (1969). Separate dissenting opinions by two justices of the said Court, printed in Appendix C hereto, are reported respectively at 436 Pa. 492, 493 (1969).

The opinion of the trial judge is unreported, and printed in the record certified herewith (S.R. 1-8). The order of

the Court of Common Pleas of Philadelphia County, sitting en banc, is unreported and printed in the record certified herewith (R.60a). The order of the trial judge is unreported, and printed in the record certified herewith (R.51a).

Jurisdiction

The judgment of the Supreme Court of Pennsylvania was entered on November 28, 1969. Timely Petition for Reargument was denied on February 17, 1970. This Petition for Certiorari is filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (3) since the validity of state judicial action on grounds of repugnancy to the Fourteenth Amendment to the Federal Constitution is drawn in question.

Question Presented

Whether a State court may find infringement of State Constitutional and Statutory Mandates for civil trial without delay, by failure of a trial judge to decide litigation for over seven years, yet refuse to award a new trial to the aggrieved party.

Statutory Provisions Involved

The provisions of the Pennsylvania Constitution of 1873, Article 1, Sec. 11, are printed in Appendix A hereto, infra p. 9. The Act of April 22, 1874, P.L. 109, §2, as amended, 12 P.S. §689, is printed in pertinent part in Appendix A hereto, infra, p. 9. The provisions of the Act of June 21, 1937, P.L. 1982, No. 392, §5, 17 P.S. §65, and Rule 78 of the Rules of the Supreme Court of Pennsylvania, adopted thereunder, are printed in Appendix A hereto, infra pp. 9, 10 respectively.

Statement of the Case

On December 10, 1956, petitioner, Exton Drive-In Inc., filed an action in assumpsit against respondent, the Home Indemnity Co., for damages under a surety bond dated April 11, 1956. The bond was conditioned on full, exact, prompt performance of a grading and paving contract for construction of a drive-in theatre for petitioner. The surety joined the contractor, co-respondent herein, as additional defendant and a counter-claim was filed against petitioner by said contractor.

The parties waived a jury trial under pertinent statute controlling trials without jury in Philadelphia County. The case was tried by a trial judge in May 1960. The statute required filing of decision within 60 days. Requests for findings of fact and conclusions of law were submitted by counsel for petitioner, but the trial judge failed to reach a decision.

On July 29, 1966, respondent contractor instituted mandamus to compel a decision naming the trial judge as party defendant. Nothing further was done by plaintiff or defendant in that proceeding. On June 28, 1967, the trial judge entered a verdict in favor of the contractor and against petitioner, with interest from September 30, 1957. No findings of fact or conclusions of law were made by the trial judge at any time, although the statute predicated the appeal of petitioner upon erroneous findings or legal conclusions by the trial judge.

Exceptions were filed by petitioner in the court below, including, inter alia, denial of due process by refusal to award a new trial (R.53a-54a). On June 28, 1968 the court overruled the exceptions, adhering to the presumptive correctness of the skeleton verdict (R.60a). Not until April 18, 1969, did the trial judge file any opinion whatsoever,

approximately nine years after completion of a lengthy transcript with disputed factual testimony.

After argument, the Supreme Court of Pennsylvania affirmed judgment by split decision. The majority recognized that the shocking dereliction of the trial judge breached the Pennsylvania Constitution and pertinent Acts of Assembly. However, the court concluded that a new trial was not required. The dissenters expressly found that the delay resulted in a denial of due process compelling the award of a new trial.

Reasons For Granting The Writ

This case presents fundamental constitutional issues not heretofore resolved by this Court. At a time when massive backlogs plague the judiciary and congested court dockets are reluctantly accepted conditions, delayed justice and steadily eroding public confidence in the judicial process require this Court to articulate minimum due process safeguards for trial without delay.

The provisions of the Pennsylvania Constitution of 1873, Art. I, Sec. 11 guarantee orderly and timely judicial process. (Appendix A, infra p. 9). It safeguards "remedy by due course of law, and right and justice administered without sale, denial or delay." This Court has conceived "promptness of decision in all judicial actions is one of the elements of justice." *Forsyth v. Hammond*, 166 U.S. 506, 513 (1897); *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185 (1959).

The practice of trial by judge, without jury, in civil trials is prescribed by the Act of April 22, 1874 (supra). The Supreme Court has held the provisions of that Act (Appendix A, infra p. 9), to be mandatory, which must be complied with strictly. *Singer v. Oil City Redevelopment Authority*, 437 Pa. 55 (1970); *Meitner v. Scarborough*, 321

Pa. 212 (1936). The statutory directive for written decision by a trial judge within sixty days has been interpreted as directory, when congested calendars or delays of reasonable duration were involved. The trial judge must however separately state factual findings and legal conclusions, upon request, since appeals by parties aggrieved take the form of exceptions therefrom.

The Pennsylvania legislature authorized the Supreme Court of Pennsylvania to adopt rules of practice and procedure in the nisi prius courts, by the Act of June 21, 1937, P.L. 1982, No. 392; 17 P.S. §61 et seq., the language of which is not here at issue. The authority of the highest state court to prescribe additional general rules is conferred by the legislature "for the express purpose of expediting litigation" and " facilitating a speedy and proper administration of justice." 1937, June 21, P.L. 1982, No. 392, §5; 17 P.S. §65 (Appendix A, infra p. 9). Pursuant thereto, the Supreme Court of Pennsylvania adopted reporting requirements for submission in writing by judges below, of the cause of any delay in disposition of matters presented for determination, after expiration of sixty days. Rule 78, Rules of Supreme Court of Pennsylvania. Such rules, promulgated under the 1937 Act, as amended, have the force and effect of statute. *Dombrowski v. City of Philadelphia*, 431 Pa. 199 (1968).

This state judicial machinery fares well only so long as the judiciary acts in consonance with its own Constitution, laws and procedures. The State Constitution safeguards trial without delay. The legislature conditions waiver of jury upon timely and orderly determination. Mandatory judicial procedure implements the requirement of prompt decision. Within such framework, mere irregularities would not traditionally infract the Fourteenth Amendment. However, where state action results in commission of error

of such gross magnitude, unrelated to rational judicial process, deprivation of federally guaranteed rights cannot be sanctioned. Fourteenth Amendment protections against infringement by a state, extend to judicial action. *Shelly Kramer*, 334 U.S. 1 (1948).

The refusal of the majority to award a new trial offended the due process clause of the Fourteenth Amendment. Relief was declined despite admitted breaches of the State Constitution, the mandatory Acts of Assembly and fundamental fairness. The self imposed inaction of the trial judge, the abbreviated adjudication in violation of statute, after suit against the trial judge, palpably tainted the proceedings. The constitutional infirmity which resulted could not be cured by an independent assessment of the stale record, once the breach had been determined. Due process of law envisions orderly decision by a trier of fact within reasonable time of trial. The passage of years, standing alone, imposed an intolerable burden upon the trial judge to retain nuances impressions and recollections of the May 1960 proceedings. His ability to evaluate deportment, to consider frankness or demeanor, and to weigh conflicting evidence evaporated and the "trial" became relegated to a mere deposition or discovery proceeding. Under such circumstances, the failure of the court to award a new trial contradicts its own rationale for deferring to the trier in criminal cases. Thus in *Commonwealth v. Lopinson*, 427 Pa. 284 (1967) the same court reasoned at pages 303-04:

> There is no question but that a witness's appearance and demeanor is an important consideration for the jury in assessing his credibility. As stated by Chief Jusitce Appleton in his treatise on evidence, at page 220: "The witness present, the promptness and unpremeditatedness of his answers or the reverse, their distinctness and particularity or the want of these essentials, their incorrectness in generals or particualrs, their directness or evasiveness, are soon detected. . . . The appearance

and manner, the voice, the gestures, the readiness and promptness of the answers, the evasions, the reluctance, the silence, the contumacious silence, the contradictions, the explanations, the intelligence or the want of intelligence of the witness, the passions which move or control—fear, love, hate, envy, or revenge—are all open to observation, noted and weighed by the jury.'" Quoted in 5 Wigmore, Evidence §1395, at p. 126 (3d ed. 1940). See also, *Danovitz v. Portnoy*, 399 Pa. 599, 605, 161 A. 2d 146, 149 (1960); *High v. Berret*, 148 Pa. 261, 264, 23 A. 1004 (1892); and, *Robinson v. Robinson*, 183 Pa. Superior Ct. 574, 575, 133 A. 2d 259, 260 (1957).

This Court has recognized that constitutional protections against unreasonable search and seizure are enforceable against state action in civil litigation for enforcement of local police power legislation. *Roland Camera v. Municipal Court of San Francisco*, 387 U.S. 523 (1967); *Norman See v. City of Seattle*, 387 U.S. 541 (1967). The extension of constitutional protections, generally afforded criminal defendants, to civil defendants in municipal enforcement actions has likewise been applied by the Pennsylvania Supreme Court, *Berman v. Philadelphia*, 425 Pa. 13 (1967). The failure of the majority below to equate the "automatic reversal doctrine" of criminal law to the bizarre circumstances of this civil action is not tolerable under the Fourteenth Amendment.

It should finally be noted that the fundamental ingredients of opportunity to be heard at a meaningful time and manner, *Goldberg v. Kelly* ..... U.S. ....., 25 L. Ed. 2d 287 (1970), do not remain intact when state judicial action seeks to terminate litigation by assessment of a stale record despite recognized infringement of applicable constitutional, statutory and judicial practices.

CONCLUSION

For the foregoing reasons, petitioner requests that a writ of certiorari be granted by this Court.

Respectfully submitted,

HARRY NORMAN BALL
CARL K. ZUCKER
Counsel for Petitioner

APPENDIX "A"

Statutory Provisions Quoted

§ 689. Proceedings on trial without jury

The decision of the court shall be in writing, and, if requested by counsel for either party for the purposes of filing exceptions or for the taking of an appeal, shall state separately and distinctly the facts found, the answers to any points submitted in writing by counsel and the conclusions of law, and shall be filed in the office of the prothonotary or clerk of the proper court where the case is pending, as early as practicable, not exceeding sixty days from the termination of the trial, and notice thereof shall be forthwith given by the prothonotary or clerk to the parties or their attorneys, and if no exceptions thereto are filed in the proper office within thirty days after service of such notice judgment shall be entered thereon by the prothonotary or clerk; if exceptions to the findings of facts or conclusions of law be filed within said thirty days, the court or the judge thereof who tried the case in vacation, may, upon argument, order judgment to be entered according to the decision previously filed, or make such modifications thereof as in justice and right shall seem proper, subject always, nevertheless, to the right to appeal to the Supreme or Superior Court; such appeal to be taken in the time and manner and with the effect prescribed by law. 1874, April 22, P.L. 109, § 2; 1935, July 10, P.L. 640, § 1.

§ 65 Additional rule making power

For the purpose of expending any business of the courts of record in this Commonwealth, whether civil or criminal, which is not otherwise specifically regulated by any of the

general rules hereinabove provided for, and for the purpose of facilitating a speedy and proper administration of justice, the Supreme Court of Pennsylvania shall have the power to prescribe additional general rules for the conduct of such business of any court of record within this Commonwealth, but such rules shall not include any provision regulating the admission of attorneys to practice before any of the trial courts of this Commonwealth. 1937, June 21, P.L. 1982, No. 392, § 5.

§ 11 Courts to be open; suits against the Commonwealth

All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.

Rule 78

B. Each Judge of the courts covered by this rule shall report to the Prothonotary of the Supreme Court for the Eastern District, on forms furnished by the Supreme Court, not later than the tenth day of each calendar month, for the period ending with the last day of the preceding calendar month, all cases and other matters which have been submitted to any judge or judges for decision and which have remained undisposed of for sixty (60) days or more after having been submitted, and explain briefly the cause of the delay as to those matters.

APPENDIX "B"

Opinions and Judgments Below

IN THE

SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

JANUARY TERM, 1968 No. 466

EXTON DRIVE-IN, INC.,

Appellant,

vs.

THE HOME INDEMNITY CO.

and

W. ARNOLD BLYTHE, Ind. and
t/a BLYTHE CONTRACTORS

POMEROY, J. FILED: November 28, 1969

This action was commenced in 1956 when Exton Drive-In, Inc. (Exton) filed a complaint in assumpsit against the Home Indemnity Co. (Home) seeking damages under a performance bond in which Home and W. Arnold Blythe (Blythe) had bound themselves jointly and severally to Exton in the sum of $52,000. The bond was conditioned on the full and prompt performance by Blythe of a contract between him and Exton for the grading and paving of

a site for an outdoor motion picture theater. Exton alleged that this contract had not been fully and promptly performed and claimed damages in the amount of $42,500, being the profits allegedly lost because of delay in performance plus the estimated cost of remedying the defects in performance. Because the bond was a joint undertaking of Blythe as principal and Home as surety, Home impleaded Blythe as an additional defendant asserting joint and several liability. In his answer to the third party complaint, Blythe denied that he had breached the contract and brought a counterclaim against Exton for the unpaid balance of the contract price and for payments for certain additional work he had performed, allegedly at the request of Exton.

The case came on for trial before a judge sitting without a jury in May, 1960. Not until June, 1967, *over seven years after the trial was completed,* did the judge enter his decision in this case. This decision was in the form of a verdict in favor of defendants Home and Blythe on plaintiff's original complaint and a verdict for Blythe on his counterclaim against Exton in the sum of $13,692.49; there were no findings of fact or conclusions of law. Exton filed numerous exceptions to this decision, which were overruled by the court *en banc* in June, 1968. This appeal followed. Not until April 18, 1969, seventeen days before this appeal was argued, did the trial judge file an opinion explaining the overruling of Exton's exceptions.

JUDICIAL DELAY

Appellant contends that the lower court's failure to order a new trial *sua sponte* because of the inordinate delay between trial and decision was an abuse of discretion.

Appellant is correct that the court below had the power to grant a new trial *sua sponte*, if in its opinion justice so

ERRATA

Page 13, lines 5 to 8 read:

Nothing in the record indicates that any party was responsible for this delay; the fault appears to have been that of the Magna Carta: "to none will we deny justice, to none

Page 13, lines 5 to 8 should read:

Nothing in the record indicates that any party was responsible for this delay; the fault appears to have been that of the trial judge. Such dereliction flouts the proud promise of the Magna Carta: "to none will we deny justice, to none

required. *Getz v. Balliet*, 431 Pa. 446, 246 A. 2d 108 (1968); *Fisher v. Brick*, 358 Pa. 260, 262, 56 A. 2d 213 (1948). The question, then, is whether the court abused its discretion by failing to do so.

Nothing in the record indicates that any party was responsible for this delay; the fault appears to have been that of the Magna Carta: "to none will we deny justice, to none will we delay it." It contravenes the guarantee of the Constitution of this Commonwealth that ". . . every man . . . shall have . . . right and justice administered without sale, denial or delay." Article I, Section 11. It flies in the teeth of the statutory standard that the decision of a court sitting without a jury ". . . shall be filed . . . as early as practicable, not exceeding sixty days from the termination of the trial. . . ." [1] The right to have justice administered without delay is a fundamental right which should not be infringed unless no other course is reasonably possible. *Kelly v. Brenner*, 317 Pa. 55, 59, 175 Atl. 845 (1934).

We said in *General Foods Corp., supra*, that as a matter of judicial administration we would not condone an eighteen month delay but that we could understand it. A seven year delay we neither condone *nor* understand; we can only deplore it. While there may have been extenuating circumstances of which we have no knowledge, we must express our sense of dismay and chagrin that a delay so protracted could occur in the courts of this Commonwealth in the 1960's.

Our unhappiness with this delay is not, however, a suffi-

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[1] Act of April 22, 1874, P.L. 109, §2, as amended, Act of July 10, 1935, P.L. 640, §689. While this statutory provision has been interpreted as directory rather than mandatory, *Commonwealth v. General Foods Corp.*, 429 Pa. 266, 271; 239 A. 2d 359 (1968), the constitutional and statutory provisions taken together create a positive duty that a court render its decision with all possible dispatch and certainly with more celerity than was shown in this case. See *Commonwealth ex rel. Duff v. Keenan*, 347 Pa. 574, 33 A. 2d 244 (1943).

cient ground for ordering a new trial, for such an order would still further defer the end to this litigation. If the facts of this case support the decision as rendered, we would compound the injustice by requiring the parties to return to their pre-1960 positions and begin anew the trial of this case. Accordingly, we hold that the lower court's failure to grant a new trial solely because of the long-delayed decision was not an abuse of discretion.

STANDARD OF REVIEW

Appellant further contends that a new trial is necessary because the evidence contradicts rather than supports the decision of the court below. That decision, as mentioned above, is in the form of a naked verdict for Blythe and Home on the original complaint and for Blythe on his counterclaim; there are no findings.[1] In such a case we must make an independent review of the record. *Idell v. Falcone*, 427 Pa. 472, 473-4, 235 A. 2d 394 (1967); *Ballinger v. Howell Mfg. Co.*, 407 Pa. 319, 180 A. 2d 555 (1962). Cf. *Yoo Hoo Bottling Co. of Pa. v. Liebowitz*, 432 Pa. 117, 119, 247 A. 2d 469 (1968).

In reviewing this record we must evaluate the contentions of Exton that there were four material breaches of the contract by Blythe and that the verdict was against the evidence. The material breaches alleged by Exton are: (1) failure to complete the contract work within the time period specified in the contract; (2) failure to make the paved surface impervious to water as required by the contract; (3) failure to use the required minimum quantities

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[1] A court sitting without a jury need not separately and distinctly state findings of fact unless the court is requested to do so by counsel for either party. Act of April 22, 1874, P.L. 109, §2, as amended, Act of July 10, 1935, P.L. 640, §1, 12 P.S. §689.

of materials; and (4) failure to grade and pave the area to allow proper drainage.

TIMELY PERFORMANCE

The contract between Blythe and Exton specified that time was of the essence and required Blythe to complete the grading and paving of the drive-in theater site within thirty-eight working days of the contract date. This provision as to timely performance gave Blythe notice that a delay in completion of the contract would delay the opening of the theater and result in losses for Exton. Losses caused by Blythe's failure to make timely performance were accordingly foreseeable. The *Restatement, Contracts*, §346 (1932) provides as follows:

> "(1) For a breach of one who has contracted to construct a specified product, the other party can get judgment for compensatory damages for all unavoidable harm that the builder had reason to foresee when the contract was made, less such part of the contract price as has not been paid and is not still payable, determined as follows . . . (b) For any delay fairly chargeable to the builder, the plaintiff can get judgment for the value of the use of the product, if it was being constructed for use."

We believe this rule is proper and sound. Cf. *Lever v. Lagomarsino*, 282 Pa. 110, 114, 127 Atl. 452 (1925). Its application in the present case would permit Exton to recover damages from Blythe for the difference between the losses caused by delay in the use of the theater and the unpaid balance of the contract price, provided only that Exton proved (a) a failure of timely performance, and (b) resulting damages which were sufficiently certain to permit recovery.

From the evidence adduced at trial, we believe Exton

did establish a failure of timely performance. Even adopting *arguendo* Blythe's definition of "working day", viz., a day on which site and weather conditions were favorable, we are persuaded that the evidence supports the conclusion that there were more than thirty-eight such days between the date of the contract (April 11, 1956) and the date upon which Blythe himself contends the work under the contract was completed (August 29, 1956).

We cannot agree, however, with appellant's contention that he proved attendant losses with sufficient certainty to permit recovery. This Court has held that a party seeking damages for breach of contract "must be able to prove such damages with reasonable certainty." *Wilcox v. Regester*, 417 Pa. 475, 484, 207 A. 2d 817 (1965). See also *Nakles v. Union Real Estate Co. of Pgh.*, 415 Pa. 407, 411, 204 A. 2d 50 (1964). "Compensation for breach of contract cannot be justly refused because proof of the exact amount is not produced . . . [T]he law does require . . . that the evidence shall with a fair degree of probability establish a basis for the assessment of damages." *Massachusetts Bonding & Ins. Co. v. Johnston & Harden, Inc.*, 343 Pa. 270, 280, 22 A. 2d 709 (1941).

This rule is in accord with the *Restatement, Contracts*, §331 (1932) which specifies:

> "(1) Damages are recoverable for losses caused or for profits and other gains prevented by the breach only to the extent that the evidence affords a sufficient basis for estimating their amount in money with reasonable certainty. (2) Where the evidence does not afford a sufficient basis for a direct estimation of profits, but the breach is one that prevents the use and operation of the property from which profits would have been made, damages may be measured by the rental value of the property or by interest on the value of the property."

Considered in the light of these principles, we think it clear that appellant was not entitled to damages because of Blythe's belated performance. The evidence shows that Blythe's delay in completing the work did not delay the theater opening. Since the motion picture screen itself was not installed until a few days before the scheduled opening, the theater could not have opened sooner than it did.

Exton contends, however, that because of the unfinished condition of the theater when it opened its revenues were less than they might have been; this loss of anticipated profits is the only damage claim attributable to delay. Under the circumstances of this case, we hold that the anticipated profits of a new and untried business which were attributable solely to the unfinished condition of the business premises were too speculative to provide a basis for an award of damages.

Where a contractor's failure of timely performance delayed the opening of a drive-in theater, the Maryland Court of Appeals upheld a ruling by the trial judge which barred evidence tending to show the loss of anticipated profits. The Court cited §331 of the *Restatement, supra,* and declared that such damages were too speculative to merit recovery. *Evergreen Amusement Corp. v. Milstead,* 206 Md. 610, 112 A. 2d 901 (1955). The damages in the present case are still more speculative, since the opening of the theater was not actually delayed.

The speculative nature of the damages here alleged to have resulted from Blythe's failure of timely performance renders them unrecoverable. This failure of performance, therefore, did not give rise to any liability on the part of Blythe. Since "the liability of the surety is no greater than [that of] its principal," *East Crossroads Center, Inc. v. Mellon-Stuart Co.,* 416 Pa. 229, 231, 205 A. 2d 865 (1965),

Home also had no liability under its performance bond because of this failure of timely performance. We hold that the trial court did not err in refusing to award damages to Exton on this ground.

OTHER ALLEGED BREACHES

As noted above, Exton alleged three other material breaches of the contract: (1) failure to make the paved surface impervious to water, (2) failure to use the required minimum amounts of materials, and (3) failure to grade and pave the area so it would drain properly. The court below found no merit in these allegations, holding that Blythe had substantially performed these aspects of its contract.

With that conclusion we must agree. Caught between adverse site conditions due to frequent rains and Exton's officer who admitted, "I was rushing Blythe, yes," Blythe sought to finish the job on time and went ahead with the grading and paving even though the soil conditions were bad. The evidence shows that the grading and paving were within a close tolerance of the contractual specifications. It also shows that the paving was impervious to water except where it had broken up. The evidence as to the causes of this deterioration is not clear, but adverse soil conditions at the time of paving and subsequent use of the theater area seem to have been the prime causal factors. The observations of Exton's non-expert theater employees as to the quantity of materials used constitute the only evidence in support of Exton's claim that Blythe failed to use the required minimum quantities of materials. This testimony lacks probative value, and was, moreover, contradicted by substantiated testimony that adequate quantities of materials were used. The weight of this testimony is further diminished by uncontradicted testimony that the

site was wet at the time the stone and gravel were laid, and that these materials sank into the wet soil when rolled.

We conclude that the evidence does not support Exton's three additional allegations of material breach. Further, despite a default notice sent to Blythe by Exton, he returned to the job thereafter, and worked intermittently from August, 1956 to May, 1957 to correct the defects which had appeared. The evidence sufficiently demonstrates that any defects in the workmanship were not the result of willful, material breaches of this contract by Blythe. *Restatement, Contracts,* §275.

DAMAGES FOR NON-MATERIAL BREACHES

Given Blythe's substantial performance of the contract, Exton was limited to recovering damages for any non-material breaches as a set-off against Blythe's claim for the balance of the contract price. In order to recover such damages, however, it had the burden of proving them. Exton's only proof of damages due to faulty workmanship was an estimate of repair costs prepared by another contractor as a unit price approximation; this estimate was made prior to some of Blythe's own repair work. Although the estimated cost of repair amounted to between one-third and one-half of the original contract price, Exton never considered the defects serious enough to contract for any portion of this repair work during the four year period between the commencement basis fo rth award of damages to Exton. We hold, therefore, that the trial court correctly decided against Exton on the original complaint and for Blythe on its counterclaim for the balances of the contract price.

CLAIM FOR ADDITIONAL WORK

Finally, Exton contends that the trial court incorrectly awarded the cost of certain extras to Blythe, since no written architect's order for them was obtained by Blythe as required by the contract. Exton, however, waived this requirement by its failure to employ an architect to supervise the performance of the work. Further, the evidence supports Blythe's contention that Exton's on-site representative requested that he do the extra work and that this work benefitted Exton. The trial court did not err in awarding the cost of this work to Blythe. See *Universal Builders, Inc. v. Moon Motor Lodge, Inc.*, 430 Pa. 550, 557-8, 244 A. 2d 10 (1968).

Finding no error in the decision below, we affirm the judgment.

Mr. Chief Justice Bell concurs in the result.

Mr. Justice Eagen concurs in the result.

Mr. Justice Cohen filed a dissenting opinion.

Mr. Justice Roberts filed a dissenting opinion in which Mr. Justice Cohen joined.

APPENDIX "C"

Dissenting Opinion of Roberts, J.

IN THE

SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

JANUARY TERM, 1968 No. 466

EXTON DRIVE-IN, INC.,

Appellant,

vs.

THE HOME INDEMNITY CO.

and

W. ARNOLD BLYTHE, Ind. and
t/a BLYTHE CONTRACTORS

ROBERTS, J. FILED: November 28, 1969

There is no doubt that a seven year delay between the completion of a non-jury trial and the rendition of a general verdict thereon is shockingly excessive. The majority well expresses my feeling of strong disapproval. Unlike the majority, however, I feel that the delay constitutes a denial of due process and requires the grant of a new trial.

One of the basic reasons for holding a trial is to resolve disputed factual questions. The primary responsibility for

this task is placed on the trier of fact. It is argued, and I think correctly, that having heard the testimony and seen the witnesses the trier of fact is in the best position to weigh the probative value of the evidence. In accordance with this belief we accord such findings great weight and are reluctant to reach different conclusions on the basis of cold records.

I think it clear that appellant was denied its right to have its evidence received and judged in this kind of a proceeding. It is impossible that the trier of fact – here the trial judge – could have remembered very much if anything of the evidence offered at trial. His decision was in effect rendered on a cold record. I would analogize the situation in this case to those instances in which a trier of fact dies after the conclusion of the trial and before rendition of a decision. In those cases it is required that the case be retried, even though a complete record of the trial may exist. *Carlsson v. Pennsylvania General Insurance Company*, 417 Pa. 356, 207 A. 2d 759 (1965); C.J.S. Judges, §56(b).

I note that the disposition of this case depended entirely on the resolution of disputed factual issues. The trial judge said in his opinion that ". . . the court deems it unnecessary to cite legal authority as the issues involved are totally factual and the trier of fact resolved these issues against plaintiff . . . and in favor of the defendant. . . ." Court of Common Pleas of Philadelphia County, December Term 1959, No. 902, April 18, 1969.

I do not see how we can say that the appellant received a complete trial. I would vacate the judgment and remand for a new trial.

Mr. Justice Cohen joins in this Dissenting Opinion.

Dissenting Opinion of Cohen, J.

COHEN, J. FILED: November 28, 1969

In addition to the reasons advanced by Mr. Justice Roberts for a remand, I further question the proceedings in the court below. The action was tried in the court below, without a jury on May 3, 4, 6 and 9, 1960. On July 29, 1966 appellee, W. Arnold Blythe, instituted an action in mandamus to compel a decision by the trial judge. Considering the great delay that had already occurred, the filing of that action made it impossible for the trial judge to fulfill properly his functions. That is, through the institution of that action, he was no longer an independent, disinterested trier of fact, but rather a litigant himself. The filing of the action may have prejudiced him against the party pursuing that course. The refusal of that party to press that action may have created a bias in favor of that party. It does not matter what the judge's decision ultimately was. The important thing is that he was placed in a position in which it would have been impossible to exercise his powers of judgment free of any interest in the matter. Therefore, I dissent.